2006

State of Utah v. Wade Maughan : Reply Brief of Petitioner Defendant

Utah Supreme Court

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IN THE UTAH SUPREME COURT

STATE OF UTAH,	:	
Plaintiff/Cross-Petitioner,	:	
v.	:	Case No. 20060189
WADE MAUGHAN,	:	
Defendant/Petitioner.	:	

REPLY BRIEF OF PETITIONER/DEFENDANT

This is the reply brief of Petitioner in an interlocutory appeal in a capital murder case presided over by the Honorable Ben H. Hadfield of the First District Court, Box Elder County, State of Utah.

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SUMMARY OF THE ARGUMENT

The central issue to be decided by this court is whether there is conflict of interest that merits the disqualification of defense lawyers in a death penalty case. Mr. Maughan and his lawyers contend that there is no conflict and therefore no basis to support disqualification. According to the trial court, there is an unarticulated "potential conflict" involving the examination of one witness, Randy Wager. Unarticulated, because the trial court declined to articulate how that conflict might manifest itself. The court made no factual findings and did not hold an evidentiary hearing.

Apparently, the court's ruling is that witness Wager was allegedly told not to speak with police. Wager, however, spoke to the police several times after contacting them on his own initiative. Wager spoke to police on at least two occasions and answered questions about Wade Maughan. There were times where

he told police he did not want to speak with them for a variety of reasons such as prior police harassment, police being against Mr. Maughan, and discussions with defense team members about not talking about the case in general. How this creates a conflict meriting disqualification is unclear. More importantly, in it's conclusions, the court did not discuss how this creates a conflict.

The state, in its brief, makes three assertions in support of disqualification: 1. Scott Williams and Richard Mauro made overt admissions that they placed their interests over the interests of Wade Maughan; 2. Criminal defense lawyers are always subject to disqualification whenever they are present during interviews with witnesses and the witnesses later make inconsistent statements; and 3. Lawyers for poor people have a less important relationship than lawyers for the affluent and therefore can be disqualified more easily.

As will be discussed below, Mr. Maughan contends that neither Mr. Williams nor Mr. Mauro ever admitted or implied putting their interests over Mr. Maughan's. Moreover, there is no conflict of interest. The last two assertions are simply not supported by existing law.

ARGUMENT

I. THERE IS NO CONFLICT OF INTEREST

A. Motions to Disqualify Should be Viewed with Caution

The state proceeds with the notion that there is a valid conflict of interest in this case.

Nowhere in its brief, however, does it address the well-established principle that motions to disqualify should be viewed with caution. *See Weaver v. Millard*, 120 Idaho 692, 819 P.2d 110 (Idaho App. 1991) (motions to disqualify opposing counsel "should be viewed with caution" as such motions "can be misused as a technique for harassment."); *Gomez v. Superior Court in and for Pinal County*, 717 P.2d 902, 905 (Ariz. 1986) (court "views with suspicion motions by opposing counsel to disqualify a party's attorney based on conflict of interest or appearance of impropriety."); *Lorin v. 501 Second St., LLC*, 2 Misc.3d 646, 769 N.Y.S.2d 361, 364 (N.Y.Civ. Ct. 2003)("Disqualification motions are carefully scrutinized because they seek to deny a party's right to representation by an attorney of his or her choice and thereby limit a valued right to the party"); *Alexander v. Superior Court*, 685 P.2d 1309, 1313 (Ariz. 1984)("only in extreme circumstances should a party to a lawsuit be allowed to interfere with the attorney client relationship of his opponent"); *State v. Madrid*, 468 P.2d 561, 562 (Ariz. 1970)("For the prosecution to participate in the selection or rejection of opposing counsel is unseemly if for no other reason than the distasteful impression which could be conveyed.") Naturally, such motions can be utilized improperly to remove aggressive and effective advocates. This case illustrates the impropriety of improper prosecution tactics used to argue for disqualification.

The state first argues that defense counsel instructed witnesses not to speak with police. The witnesses deny that such statements were made. The witnesses nonetheless spoke with police. The state then argues that Mr. Mauro pretended to be a television reporter and that Scott Williams might have been a getaway car driver in an attempt to interview a witness. The state alleged the pair committed second degree felony communications fraud. The defense, however, proved that claim to be absolutely false. The state even claimed that David Finlayson, a lawyer sharing office space with Mr. Mauro and Mr. Williams, likely committed the criminal offense of witness tampering in Spokane, Washington, when Mr. Finlayson has never been to Spokane and has no involvement in this case. There have been additional claims of misconduct asserted against lawyers representing witnesses in Spokane and assertions that lawyers in Utah acted improperly because witnesses in Spokane retained attorneys. The state has even accused the defense mitigation specialist of the criminal offense of notary fraud and sought to interfere with the contract process so that payment to defense counsel would be delayed or denied.

These claims should be viewed with caution as the vast majority are inaccurate and made with reckless disregard for the truth. The nature and number of claims suggests a pattern of personal harassment against the defense team members in an

effort to "pin some offense on" them to support disqualification..[1] *See* Monroe H. Freedman, Lawyer's Ethics in an Adversary System, The Bobbs-Merrill Company, Inc., at 81 quoting Supreme Court Justice Robert Jackson, Second Annual Conference of U.S. Attorneys (1940)(describing the dangers of prosecutors "pick[ing] people he thinks he should get rather than pick[ing] cases that need to be prosecuted").

B. There is no Conflict of Interest

The state goes to great lengths to speak about the discretion trial courts have in disqualifying counsel. But that decision should be based on articulable facts that this court can review and scrutinize. Here, there are no articulable facts. The court merely notes that an arrest of defense counsel appears unprecedented.[2] It then suggests that the arrest has "created a firestorm of controversy" again ignoring the fact that such controversy might be based on government misconduct. The court then muses that there is a "continuing possibility of prosecution of defense counsel in the state of Washington . . . ," again, without stating any basis

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[1] Recently, Durham, North Carolina District Attorney Michael Nifong was disbarred for making inaccurate public statements about a rape case in his district. *See* The *North Carolina State Bar v. Michael Nifong*, Amended Findings of Fact, Conclusions of Law and Order of Discipline, Case No. 06DHC35. Mr. Maughan contends that much of the information presented in public pleadings here is similar to inaccurate public comments made by Nifong in North Carolina.

[2] The court fails to state any reference or authority as to why or how it concludes the arrest is unprecedented, nor did it consider, as asserted by Mr. Maughan, that it was done for an improper purpose.

for that proposition.[3] The court then leaps to the conclusion that Utah Rule of Professional Responsibility 3.4 might have been violated without stating how or in what manner. Apparently, the lynchpin of the court's argument for disqualification revolves around the conclusion that "[t]here is a potential conflict that examination of Mr. Wagar at trial might raise issues which implicate either Mr. Mauro or Mr. Williams to the defendant's detriment . . . ," once more without explaining, articulating, or identifying what those "detriments" might be.[4]

The court's subjective conclusion that the arrest was unprecedented and the resulting "firestorm" do not create a conflict.[5] Although the court does not state how Mr. Wagar's testimony might implicate defense counsel, the state suggests that anything Wagar might say inconsistent with what he allegedly told police would make Mr. Mauro, Mr. Williams, Mr. Brown, and Mr. Cilwick potential

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[3] No criminal charges have been filed in Spokane, Washington and the matter is now nearly two years old.

[4] The state contends that it is "entitled to explore Wagar's biases . . . , [at which point] the events concerning the witness tampering allegations will become relevant." It is equally relevant to explore the biases of the police to suggest that they lied, that they bullied and threatened witnesses, and that they arrested members of the defense team as a means of preventing access to the witnesses. Mr. Maughan has filed a second motion for interlocutory appeal claiming that the alleged confession was coerced and that any order compelling Mr. Maughan to testify in the trial of the co-defendant should be stayed. Utah Supreme Court Case No. 10061166. Once that motion is heard in the trial court, police credibility will certainly be critical to that claim..

[5] If an arrest and resulting "firestorm" creates a conflict, police would have the incentive to arrest defense counsel in every case when confronted by competent and aggressive opponents.

witnesses. The way trials work in Utah and elsewhere in the United States is that witnesses testify. Those witnesses are then subject to cross-examination. Neither side "owns" witnesses and oftentimes one or both sides will seek to interview witnesses before trial. Frequently, those witnesses make inconsistent statements.[6] If the witness makes an inconsistent statement, then an independent witness, for example a police officer or defense investigator, can testify and explain the prior inconsistency. Rules of evidence everywhere in this country contemplate this very scenario.

If this Court concludes that the presence of a lawyer at an interview is grounds for disqualification, then neither prosecutors nor defense lawyers could ever be present for interviews with trial witnesses. That is not the state of the law in this country. *See Stearnes v. Clinton*, 780 S.W.2d 216, 224 (Tex. Crim. 1989)("If merely talking with a witness produces a disqualification because there is a mere possibility that claims of misconduct could be made, then all investigators, prosecutors, and defense lawyers will invariably be subject to being removed. That simply and understandably is not the law.").

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[6] As suggested by the state, there are all sorts of reasons that witnesses make inconsistent statements. The state claims that the sole reason Mr. Wagar made inconsistent statements is because he has bias in favor of Wade Maughan. The state's one-sided view of the evidence does not justify disqualification. There are, of course, a number of additional reasons Mr. Wagar may have made inconsistent statements, e.g., memory problems, and police coercion and lies. Of course, Mr. Maughan contends that Mr. Wagar never told police he was told not to talk to them and any suggestion otherwise was fabricated by police.

II. NEITHER SCOTT WILLIAMS NOR RICHARD MAURO ADMITTED NOR IMPLIED THAT THEY PLACED THEIR INTERESTS ABOVE THOSE OF WADE MAUGHAN THUS ACKNOWLEDGING A CONFLICT OF INTERTEST.

In its brief, the state contends that Scott Williams "admitted to an actual Sixth Amendment conflict of interest." State's Brief, at 29. They base this assertion on a letter Mr. Williams sent to the prosecutors regarding production of discovery in Mr. Maughan's case. A simple review of the letter, however, reveals no such admission. On December 15, 2005, Mr. Williams wrote a letter to the prosecutors referencing three things. First, he notes that any claims of wrongdoing in Spokane were unfounded. Second, he expressed concerns about the prosecutor's direct interference in the contract process with the defense team chiefly because the prosecutors were not parties to the contract and defense had incurred significant costs in Mr. Maughan's defense.[7] Third, Mr. Williams requested the state immediately provide discovery *relating to Mr. Maughan's case* and that in light of the Spokane events any cooperative efforts to share costs had ended. A passing reference that events in Spokane have "wholly occupied our time" is accurate as the defense team then, as now, contends the allegations and claims of wrongdoing were unfounded.

Similarly, Mr. Mauro made no admission that he had placed his interests above Mr. Maughan's. Again, the state mischaracterizes a letter sent to the prosecutors

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[7] The prosecution's interference with the funding mechanism has an obvious chilling effect on counsels' ability to provide effective representation.

regarding the arrests in Spokane. On December 27, 2005, Mark Moffat, an attorney representing Mr. Mauro and Mr. Cilwick, sent a letter to the prosecutors regarding the arrests in Spokane. That letter was sent specifically to inform the prosecutors that police actions up to that point have "*substantially interfered with Mr. Mauro's and Mr. Williams' efforts to represent Mr. Maughan.*" (emphasis added). Mr. Moffat was clear that an extensive investigation proved no wrongdoing on the part of the defense team and that continued efforts to undermine the defense effort would hurt both the defense team personally and Mr. Maughan:

> It is my sincere desire before additional action is taken that due consideration be given to the issues identified above and the significant ramifications to the constitutional rights of my clients and Mr. Maughan. TR, 135

No reasonable reading of these letters would lead to the conclusion that Mr. Williams, Mr. Mauro, or any member of the defense team placed their interests above that of Wade Maughan. The state mistakenly equates the natural objections to the government's misconduct as a basis to state that the defense team placed their interests above Wade Maughan's. In fact, the record shows the opposite. The defense team has and continues to make significant efforts to represent Mr. Maughan by interviewing witnesses, requesting discovery and conducting mitigation.[8]

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[8] Mr. Maughan even filed a petition for extraordinary relief to fund Mr. Maughan's defense as the trial judge has denied all orders for payment. *See Wade*

The problem with the state's argument is that once police or prosecutors claim misconduct then the defense team should automatically be disqualified – even if the allegations are false or made in an attempt to orchestrate disqualification. If Mr. Maughan did not challenge the accuracy of the state's claim, then the state would argue for disqualification. Once the defense challenges the accuracy and truthfulness of the claims, then on the state's theory, they are still subject to disqualification because they are placing their interests before the client's. The state's argument on this point lacks merit because it creates an untenable Hobson's choice. An objection to the allegations results in disqualification because counsel then places their interests above the client's. No objection to the allegations results in disqualification because the allegations are deemed true. Here, there is no admission of wrongdoing by defense counsel and no basis to support disqualification.

III. THE STATE'S ARGUMENT THAT POOR PEOPLE HAVE A MORE LIMITED RELATIONSHIP WITH AN APPOINTED LAWYER THAN AN AFFLUENT PERSON AND THEREFORE THAT THEIR LAWYER IS MORE EASILY DISQUALIFIED WOULD SET BAD PRECEDENT

In its brief the state argues that the "Sixth Amendment right to representation by chosen counsel applies only to non-indigent defendants." State's

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Maughan v. Ben H. Hadfield, Supreme Court Case No. 20061110. The state threatened to file criminal charges against the mitigation specialist who, despite not being paid, continued to work on Mr. Maughan's behalf by requesting records and preparing the mitigation workup through March of 2006.

Brief, at 16. In the cases cited by the state, the courts state the obvious premise: "[a] defendant may not insist on representation by an attorney he cannot afford." *Wheat v. United States*, 486 U.S. 153, 159 (1988). That statement is made in the context of accused indigent persons who request representation by a particular lawyer. Understandably, courts cannot appoint requested lawyers, but rather refer those persons to public defender offices or appointed panel lawyers. The best example in Salt Lake County is the Salt Lake Legal Defender Association, the agency to which indigent defendants are referred. Once that office is appointed, then the accused logically has no right to a particular attorney, but a lawyer is appointed presumably as part of a rotation process.

The cases do not stand for the proposition that indigent persons should have a less meaningful relationship with their lawyer than an affluent person. That would create a two-tier system of justice: one for the rich and one for the poor. That is a concept that the United States Supreme Court has fought very hard to avoid. *See Gideon v. Wainwright*, 372 U.S. 335 (1963). The cases cited by the state are attempting to communicate that indigent persons must accept the lawyer appointed to them, not that an appointed lawyer is more easily disqualified or has a lesser attorney client relationship because the person is poor. Justice Brennan in his concurrence in *Morris v. Slappy*, discussed this concept:

> This ground of distinction, however, is not sufficient to preclude recognition of an indigent defendant's interest in continued representation by a particular lawyer who has been appointed to represent him and with

> whom the defendant has developed a relationship. Nothing about indigent defendants makes their relationships with their attorneys less important, or less deserving of protection, than those of wealthy defendants . . . . There can be no equal justice where the kind of trial a man gets depends on the amount of money he has. . . . [W]here an indigent defendant wants to preserve a relationship he has developed with counsel already appointed by the court, I can perceive no rational or fair basis for failing at least to consider this interest in determining whether continued representation is possible.

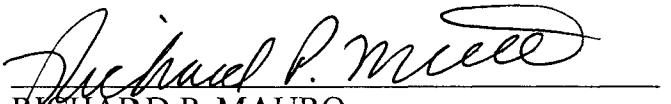
461 U.S. 1. 22-23 (1983)(Brennan, J., concurring).

A suggestion that the state or court have the authority or power to more easily remove or disqualify appointed counsel would appear inconsistent with the spirit and intent of the United States Supreme Court and its recognition of the importance of appointed counsel in serious felony cases. If this court were to conclude that it is somehow easier to disqualify appointed counsel merely because the defendant is indigent, it would seriously undermine the legitimate and effective efforts of appointed counsel in these cases.

CONCLUSION

Mr. Maughan requests that this court reverse the order of the trial court and reinstate Mr. Williams as Mr. Maughan's lawyer.

DATED this 15th day of August, 2007.



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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Reply Brief of Petitioner/Defendant was mailed via U. S. Mail, postage prepaid, on the 15th day of August, 2007, to:

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